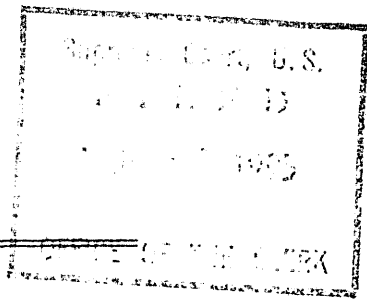

No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLEMEW, AND KIMBERLEY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal From The
United States District Court
For The Western District Of Virginia

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, the National Association For The Advancement Of Colored People (NAACP) respectfully submits this brief *amicus curiae* in support of Appellants. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of

the letters of consent have been lodged with the Clerk of the Court.

The NAACP is the oldest and largest civil rights organization in America. Founded in 1909, the NAACP was instrumental in the earliest battles for the franchisement of southern blacks through enforcement of the Fifteenth Amendment. The organization's perspective on the issue of discrimination in voting and access to the ballot is for this reason unique. This case raises questions directly bearing on the extent to which a state or one of its statutorily sanctioned political parties may alter unilaterally the form of selecting nominees for Congressional office, ostensibly a change "with respect to voting" under the Voting Rights Act of 1965 and one of the Act's most fundamental safeguards against infringement of the Fifteenth Amendment. Accordingly, this case has substantial public interest ramifications. We believe that our perspective will complement the brief of Appellants and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

The early history of efforts to enforce the Fifteenth Amendment witnessed an arrogant strategy by southern states to configure their electoral systems in ways which evaded the direct application of federal court decrees. Like the malevolent Proteus in Greek mythology† -- who eluded

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† *See* HOMER, ODYSSEY, Book IV, lines 451-456 (S.H. Butcher trans. 3d. ed. 1895) ("Now behold, at the first he turned into a bearded lion, and thereafter into a snake, and a pard, and a huge boar; then he took the shape of running water, and of a tall and flowering tree.")

restraint merely by changing shape -- certain states bent upon perpetuating the exclusion of blacks from the polls reacted to judicial enforcement of the Fifteenth Amendment by changing their electoral systems to accomplish the same unlawful objective in a different, more elusive form. The *White Primary Cases* illustrate this story in its most insidious manifestation.

After "nearly a century of systematic resistance to the Fifteenth Amendment," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), Congress passed the Voting Rights Act of 1965, designed "to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969). Under Section 5 of the Act, *any* change in "standard, practice, or procedure with respect to voting" requires prior approval, or preclearance. Section 5's preclearance requirement applies whether or not the change suggests, in the first instance, any discriminatory purpose. That *any* change affecting voting rights has occurred is a sufficient predicate to activate Section 5.

In 1990 the Republican Party of Virginia chose to make candidates for federal elective office subject to approval in a primary election of the voters. In 1994, the Party changed the nominating system to permit only those who had paid a $45 fee to participate in the selection of the Party's nominee. This abridgment of voting rights constituted a "change" within the meaning of Section 5 and thus required federal approval.

ARGUMENT

VIRGINIA'S CHANGE FROM A PRIMARY ELECTION SYSTEM TO A CONVENTION AT WHICH VOTERS MUST PAY A FEE AS A CONDITION OF PARTICIPATION IS A CHANGE "WITH RESPECT TO VOTING" UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 AND REQUIRES PRECLEARANCE.

A. Unilateral Changes In A State's Electoral System Demand The Most Careful Judicial Scrutiny.

1. Under the Constitution, the states exercise wide discretion in the formulation of systems by which their citizens choose representatives in Congress. U.S. Const. Art. I, § 2; Amend. XVII; *Ex Parte Yarbrough*, 110 U.S. 651, 663 (1884). The establishment of voter qualifications is a crucial step in this process. In an infamous era of our Nation's history, certain states structured their electoral systems in order to prevent blacks from having access to the polls. As courts began enforcing the Fifteenth Amendment, *post hoc* restructuring of electoral systems became the brazen strategy of states intent upon circumventing the Fifteenth Amendment's effect. Even when laboring under court oversight, the affected states often "merely switched to discriminatory devices not covered by the federal decrees." *South Carolina v. Katzenbach*, 383 U.S. at 313-314. Thus, the very flexibility accorded the states to fashion their own, preferred electoral systems -- and to change those systems when and how they pleased -- became the vehicle for continued oppression of blacks.

A typical stratagem of recalcitrant states was to recast their activities as private and voluntary, and thus assertedly beyond the reach of the courts. The history of the "white

primary" illustrates the sinister dynamic in play when a state bent on abridging black access to the polls abused its constitutional right to change its electoral structure. Beginning in 1889, the Jaybird Democratic Association of Texas (Jaybird Party) held "unofficial" primary elections to select candidates for county offices. These candidates entered the Democratic party primary, were invariably nominated and then elected in a usually uncontested general election. White voters automatically became members; blacks were excluded. This "self-governing, voluntary club" was organized to disenfranchise blacks and circumvent the Fifteenth Amendment. *See* S. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969 23-54 (1976).

Initially, in *Newberry v. United States*, 256 U.S. 232(1921), the Court concluded that party primary elections were unknown to the framers and thus beyond the reach of the Constitution. Two years later, the Texas legislature enacted a statute expressly barring blacks from voting in a Democratic primary. In response, the Court in *Nixon v. Herndon,* 273 U.S. 536 (1927) held this measure invalid under the Fourteenth Amendment. The Texas legislature reacted with another statute that authorized the state party executive committee to determine membership qualifications, including race. That statute was held invalid in *Nixon v. Condon,* 286 U.S. 73 (1932). In response to *Condon,* the Texas legislature repealed all state primary election statutes, anticipating that the Democratic state convention would exclude blacks, a gambit the Court upheld in *Grovey v. Townsend,* 295 U.S. 45 (1935) as "private" discrimination beyond the Constitution.

Not until *Smith v. Allwright*, 321 U.S. 649 (1944), when the Court overruled *Grovey*, did the white primary

finally end. In a suit sponsored by the NAACP, the Court deemed the Texas primary system an integral part of the state's election procedures, meaning citizens had the right under the Fifteenth Amendment to vote in primary elections free of racial discrimination. The discrimination was not merely "private." Since state law authorized primary elections and regulated the party's procedures, the party in convention acted as an agent of the state in excluding blacks. "The privilege of membership in a party may be, as this Court said in [*Grovey*], no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State." *Smith v. Allwright*, 321 U.S. at 664. The rationale of *Allwright* was extended in *Terry v. Adams*, 345 U.S. 461 (1953) when the Court invalidated an unofficial primary held by a private, all-white "club" despite the lack of state regulation of the club.

The states' repeated efforts to preclude blacks from the ballot by manipulating their electoral systems is thus the tragic historical context of any case challenging unilateral changes affecting voting rights. The most salient lesson of the *White Primary Cases* -- that states with a history of racial discrimination would effect electoral changes in order to perpetuate in one form what had been declared unlawful in another -- informed the structure of the Voting Rights Act of 1965. *See* LAWSON, *supra.*

2. Congress adopted the Act in 1965 to implement the Fifteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and to "erase the blight of racial discrimination in voting." *U.S. v. Board of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 117 (1978). The danger of states restructuring their electoral systems for discriminatory

purposes led to the Act's "stringent remedies aimed at areas where voting discrimination has been the most flagrant." *South Carolina v. Katzenbach*, 383 U.S. at 315. Congress resorted to these extraordinary measures because experience had shown them to be necessary to eradicate the "insidious and pervasive evil of [racial discrimination in voting] that had been perpetuated in certain parts of the country." *Id.* at 309. Earlier efforts to end this discrimination by facilitating case-by-case litigation had proved ineffective.

The structure and operation of the Voting Rights Act are straightforward. The statute requires federal approval of *all* changes in the method of election in "covered" jurisdictions -- those identified as having a record of minority disenfranchisement by an arguably questionable formula. 42 U.S.C. 1973b. In the past, States and the political units within them had responded to federal decrees outlawing discriminatory practices by "resort[ing] to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . ." *South Carolina v. Katzenbach*, 383 U.S. at 335. In order to ensure that covered states did not pass new legislation to obstruct black voter registration or to dilute the expected emergent voting strength of blacks, the states were prohibited by Section 5 of the Act from enacting any change in "voting qualifications or prerequisites to voting, or standard, practice or procedure with respect to voting" without first obtaining clearance from the Attorney General or a federal district court in Washington, D.C. 42 U.S.C. 1973c. Thus, these states -- including Virginia -- had the affirmative burden to secure federal permission to change their voting laws. To prevent any future circumvention of constitutional policy, a designated State or political subdivision wishing to change its voting laws must demonstrate

that the change will be nondiscriminatory. "By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims." *Sheffield*, 435 U.S. at 117.

The Court's decisions have given Section 5 the broad, searching scope suggested by the language of the Act. In *Allen v. State Board of Elections*, *supra*, the Court's examination of the Act's objectives and original legislative history yielded the conclusion that Section 5 should be given "the broadest possible scope," 393 U.S. at 567, and prior federal scrutiny should be had of "any state enactment which altered the election law in a covered State in even a minor way." *Id.* at 566.

Thus, the Court has required federal preclearance of laws changing the location of polling places, *see Perkins v. Matthews*, 400 U.S. 379 (1971); laws adopting at-large systems of election, *ibid*; laws providing for the appointment of previously elected officials, *Bunton v. Patterson*, 390 U.S. 978(1968)(decided with *Allen, supra*); laws regulating candidacy, *Whitley v. Williams*, 390 U.S. 1009 (1968)(decided with *Allen*); laws changing voting procedures, *Allen, supra*; annexations, *City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 410 U.S. 962 (1973); and reapportionment and redistricting, *Beer v. United States*, 425 U.S. 130 (1976). In each case, "federal scrutiny of the proposed change was required because the change had the potential to deny or dilute the rights conferred by" the Act. *Sheffield*, 435 U.S. at 118.

3. Indeed, of principal concern to Congress when it extended the Voting Rights Act in 1982 was "the preva-

lence of changes that were implemented without preclearance and, in some cases, were not submitted to the Attorney General until years later." *NAACP v. Hampton County Election Com'n*, 470 U.S. 166, 176 (1985). *See* S.Rep. No. 417, 97th Cong., 2d Sess. 12, 14 n. 43 (1982); H.R.Rep. No. 227, 97th Cong., 1st Sess. 13 (1981), *reprinted in* 1982 U.S.Code Cong. & Admin.News 177, 189, 191, 192. The Senate Report stated:

> Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law. The Supreme Court has recognized that enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance. The extent of non-submission documented in both the House hearings and those of this Committee *remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after, when sued or threatened with suit.* Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

S.Rep. No. 417, *supra*, at 47-48, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 225, 226 (emphasis added). The legislative history of the most recent extension of the Voting Rights Act reveals Congress' firm commitment to its continued vigorous enforcement. The Senate Committee found "virtual unanimity among those who had studied the record," S.Rep. No. 417, *supra* at 9, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 186, that Section 5 should be extended. Further, Congress spe-

cifically endorsed a broad construction of Section 5, as it had in previous extensions of the Act.

Although the Fifteenth Amendment is "self-executing," *Guinn v. United States*, 238 U.S. 347, 362-363 (1915), the Court cautioned long ago that the right to be free from racial discrimination in voting "should be kept free and pure by congressional enactment whenever that is necessary." *Ex Parte Yarbrough*, 110 U.S. at 665. The intensity of the struggle for the realization of this constitutional guarantee -- and the national aspirations which hung in the balance if Congressional intervention, in the end, were anything short of extraordinary -- are values writ large in the 1965 Act. Further efforts by the states to circumvent the law by recasting their electoral systems with impunity until they were challenged in court, would be precluded by an approach which shifted the burden to the states to demonstrate that changes in their systems were not discriminatory. The instant case must be resolved with this historical context in mind.

B. The Party's Decision To Change From A Primary To A Convention System Required Preclearance.

1. Under the laws of Virginia a political party may select its senatorial nominee by a primary election or by other means. Va. Code Ann. §§ 24.2-101, 24.2-509(A) (Michie 1993). Section 24.2-511 of the state code accords the Virginia Republican Party preferential access to the general election ballot for its nominee. The candidate selection process in *Smith v. Allwright, supra*, included the same state involvement.

Over the course of time, the Virginia Republican Party has used various means to select its senatorial nomi-

nees, most recently by convention. In 1990, the Party decided to select its nominee at a primary election, but the election was canceled when no one challenged the Party's incumbent.

For the 1994 senatorial election, the Party decided to select its nominee at a convention, the delegates to which were identified at local "mass meetings" and required to pay a nonrefundable fee to the Party. The practice of charging the fee was not in effect on November 1, 1964. Nevertheless, the Party has never sought preclearance of the fee under Section 5 of the Act, nor sought preclearance to convert from the primary to the convention format.

2. The district court concluded that the imposition of the fee is not subject to Section 5's preclearance requirement. "The Party is not conducting primary elections. Instead local party members are selecting delegates to the state nominating convention, not through an election, but through local conventions, mass meetings, and party canvasses. This distinction is meaningful." 853 F. Supp. at 216. In reaching its conclusion, the district court relied upon 28 C.F.R. 51.7, the Department of Justice regulation promulgated pursuant to Section 5. This regulation provides (*ibid.*, emphasis added):

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For

> example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. *Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5.*

The district court reasoned that the acts of the Party are not subject to preclearance because "there is no doubt that the Party is not conducting a primary election, and there is no voting as defined." 853 F. Supp. at 216.

The district court's analysis was flawed. A "change[] with respect to the conduct of primary elections," 28 C.F.R. 51.7, plainly has occurred. In 1990 the Party decided to choose its nominee by primary, a process open to all eligible voters. By 1994 the process had been changed to require that a person desiring to have a vote in the selection of his or her party's candidate pay a $45 fee to purchase the title of "delegate." When the State of Virginia permitted the Party to establish a system of open primary elections, the party selection process became a state action granting the right to vote. That right was abridged by eliminating the primary process and replacing it with a process by which a voter had to pay a $45 fee to become a delegate. As such, the change was one subject to Section 5.

The district court's argument that the present delegate system is not subject to Section 5 because "voting" means voting in a public election, not participation in a party convention, is specious. First, the Voting Rights Act itself does not limit its scope to primary or general elections. The Act refers not to "elections" but to "voting," a more encompassing term. Second, although the Justice

Department's regulations refer to "primary elections," this language is by way of "example" and was not intended to be an exhaustive description of the Act's scope. 28 C.F.R. 51.7. In 1990, the right to "vote" in a party primary was the right of all qualified to vote. The right to "vote" in a party nominating convention as abridged in 1994 included only those who could pay to do so.

We do not suggest nor was it alleged below that the Party's restructuring of its primary system had a discriminatory purpose -- only that the procedures set forth in the Act were not observed. So long as "[t]he power of a citizen's vote is affected," irrespective of whether "[s]uch a change could be made without discriminatory purpose or effect," the State must "submit such changes to scrutiny." *Allen v. State Board of Elections*, 393 U.S. at 569-570. Accordingly, it is not the Court's "province, nor that of the district court below, to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or the District Court for the District of Columbia." *Hampton County Election Com'n*, 470 U.S. at 181.

Changes made to the electoral system without preclearance are not legitimated by the passage of time. Nor would subsequent iterations from the 1990 primary system bar the present system's being compared with the 1990 version to determine whether there has been compliance with the Act. Were this a reasonable interpretation, the following language in Section 5 would have no meaning: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under

this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure." 42 U.S.C. 1973c. The fact that one or more successive changes in the Party's process for selecting candidates has occurred without preclearance, does not mean that either the current method of selecting candidates, nor the method preceding it were valid.

For the same reasons, the district court's characterization of the Party's process as a "convention" and the court's reliance upon this "distinction" as "meaningful," 853 F. Supp. at 216, is irrelevant. It cannot rationally be disputed that the act of replacing a primary election by a convention is not covered by Section 5. The district court's crucial premise -- that having abandoned primary elections and instituted a "convention," appellees were free of all further preclearance obligations -- is belied by the history of the Voting Rights Act. No meaningful federal oversight would be possible if parties had the unilateral discretion to restructure their primaries as conventions, reserving the power to impose restrictions on participation that would not have been approved had the preclearance procedure been followed. The harsh lesson of the *White Primary Cases* -- memorialized by Section 5 of the Act -- is that *any* changes affecting voting rights in state electoral systems must be reviewed.

Even minor changes in voting procedures trigger the Act. In *Hampton County Election Com'n*, the election commission did not dispute that a change in the date of an election, if effected by statute, required preclearance. 470 U.S. at 178. Rather, the commission argued that because the rescheduling was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the

requirements of Section 5. The Court rejected this approach. "[P]lainly, *the form of a change in voting procedures* cannot determine whether it is within the scope of Sec. 5. That section reaches informal as well as formal changes, ... If it were otherwise, States could evade the requirements of Sec. 5 merely by implementing changes in an informal manner." *Id.* at 185 (emphasis added).

Analytically, the district court's decision reduces to an absurdity. Under the district court's logic, the Party could have conditioned participation in the state convention on any number of variables that would be indefensible if scrutinized by the Attorney General -- *including* a voter's race. To diminish that risk, "*any change* affecting voting, ... must meet the Section 5 preclearance requirement," 28 C.F.R. 51.11(emphasis added), because "neither the absence of discriminatory purpose nor a good-faith implementation of a change removes the potential for discriminatory effects." *Hampton County Election Com'n*, 470 U.S. at 181. This is so categorical a requirement that it applies "even though [the change] appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change." *Ibid.* For this reason, it should be self-evident that the Party's change from a primary to a convention system was subject to Section 5 preclearance.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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